

**Mercy Hospital of Buffalo and Buffalo and Western  
New York Hospital and Nursing Home Council,  
AFL-CIO. Case 3-CA-9974**

3 June 1983

**SUPPLEMENTAL DECISION AND  
ORDER**

**BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER**

On 11 January 1983 Administrative Law Judge George Norman issued the attached Decision in this proceeding.<sup>1</sup> Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions of the Administrative Law Judge.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order of 19 March 1981 (at 255 NLRB 72),<sup>3</sup> and hereby orders that the Respondent, Mercy Hospital of Buffalo, Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in said Order.

<sup>1</sup> The Board's Decision and Order is reported at 255 NLRB 72 (1981).

<sup>2</sup> In his Decision the Administrative Law Judge states that Sister Mary Blanche received her first raise after 7 months of work. As noted earlier in the Decision, however, Sister Mary Blanche began work in September 1975 and received her first raise the following July, approximately 11 months after she began work. We hereby correct the Decision to state 11 months, rather than 7.

<sup>3</sup> Member Hunter was not a member of the Board when the earlier Decision issued. The Second Circuit thereafter remanded the case to the Board solely to decide whether "the Order controls the Hospital" and whether Sister Mary Blanche's terms and conditions of employment differ significantly from those of the other employees in the unit. *Mercy Hospital of Buffalo v. NLRB*, 668 F.2d 661, 664, 666 (2d Cir. 1982). The foregoing issues are therefore the only ones before the Board in this proceeding. Accordingly, Member Hunter finds it unnecessary to pass on any other issues contained in the original Board Decision.

**DECISION**

**STATEMENT OF THE CASE**

GEORGE NORMAN, Administrative Law Judge: A formal hearing in this matter was conducted before me on August 2-6, 30, and 31 and September 1 and 2, 1982, in Buffalo, New York. The hearing was held pursuant to an "Order Remanding Proceeding to Regional Director

for Hearing," dated May 27, 1982, from the National Labor Relations Board after the United States Court of Appeals for the Second Circuit denied enforcement of the Board's prior Order in the case and remanded the matter to the Board (668 F.2d 661), holding, in effect, that Respondent was entitled to a hearing to determine whether the religious Order in the instant case controls the Hospital and whether Sister Mary Blanche, whose determinative ballot was challenged during the December 1979 election, shares a sufficient community of interest with the employees in the bargaining unit so as to warrant her inclusion in the unit.<sup>1</sup>

**FINDINGS OF FACT**

**Background**

**The Order of the Sisters of Mercy**

The Congregation of the Sisters of Mercy was founded in Ireland and received church approval in 1941. The Sisters of Mercy of the Buffalo Diocese, as to which there is no affiliation with the founding group, was formed and approved as a membership corporation under the laws of New York on February 18, 1901, for the purpose of "the care of orphans, hospital work, teaching poor children, and instruction in industrial work."

The spiritual vows of the Order are set forth in the constitution:

5. Our spirit is mercy, and our part in the plan of salvation is to bring the mercy of God to His people. The followers of the merciful Jesus and daughters of Katherine McCauley, we ponder all that mercy implies: fidelity, compassion, forgiveness, loving kindness. Mercy regards simply the need of the other; it lifts up and supports; it gives without measure; it is always gracious and tender.

6. We strive to live this spirit in a congregation which is pontifical and apostolic; the vows we take are the simple perpetual vows of consecrated chastity, poverty, obedience, and the service of the poor, the sick and the uneducated.

The Sisters of Mercy take a vow of poverty by which they "renounce the independent use of material things" and "hold in common whatever we gain by labor or gift and commit ourselves to dependence on the community for all our necessities."

The superior general and treasurer general, with the approval of the elected governing body which is called the Council, are empowered in the name of the Congre-

<sup>1</sup> The Second Circuit directed the hearing with respect to two issues: (1) "On remand, the Board should reexamine its findings that the Order controls the Hospital by considering further the nature of the powers and responsibilities of the board of trustees [should be board of directors] and the scope of authority wielded by Sister Sheila Marie and her assistants." (668 F.2d at 665.) (2) "Since we conclude that the record at this point does not justify the finding of control, the ruling regarding Sister Mary Blanche [that she was 'in a sense part of the employer'] must obviously be reconsidered. However, even if the Board on sufficient evidence again concludes that the Order controls the Hospital, it does not necessarily follow that Sister Mary Blanche must be excluded from the unit." (668 F.2d at 666.)

gation to acquire property, except that, without permission from Rome, no contract can be entered into for the purpose of acquiring or selling permanent property or incurring debts where the value exceeds the sum set by the National Conference of Bishops and approved by Rome. Further, purchase and disposition of permanent property and the incurring of debts by the Order would require the written permission of the superior general and the approval of the Council.

The Sisters of Mercy also take a vow of obedience which involves dedicating the Sisters' will to the will of God: "... submitting our will to Him in faith through the properly constituted authority of the Congregation and according to its Constitution and Directives."

Job assignments are not issued as commands to the Sisters. If a Sister employed by the Hospital is not satisfied, she is free to quit as is any other lay employee. The administrator of the Hospital knew of no situation in which a Sister had been commanded to work at the Hospital by someone in the Order. Sister Mary Blanche testified, in response to a hypothetical question, that if the superior general had stated a preference for there to be no union at the Hospital she "would not have to obey a request like that" and "would not feel at all obligated to do that." There is in fact at least one Sister who is a member of a union.<sup>2</sup>

The Order is governed by a superior general and a four-member Council elected every 4 years by delegates, who, in turn, are elected by the members of the Order. One of the purposes for which the Order was formed is to engage in hospital work. At weekly meetings, the superior general and members of the Council take up the affairs of the members and the business of the Order. The constitution of the Order regulates the conduct of the members.

Many of the Sisters of Mercy live in local houses, governed by a locally elected superior, whose rule is primarily service and spiritual leadership. The entire community of the local house ordinarily constitutes the house council and the local superior arrives at final decisions by working together with those councils. There is a convent on the eighth floor of the Hospital with an elected superior, Sister Rosemarie. The eighth floor consists of small bedrooms, a common shower, a common lavatory, a workroom for arts and crafts, a quiet room, and a community room. The eighth floor is not suitable for use as a hospital facility because of the narrow corridors and the doors. The Order pays a maintenance fee to the Hospital for the room and board of the Sisters who live on the eighth floor. The administrator of the Hospital and Sister Mary Blanche have different religious superiors inasmuch as the administrator lives in the eighth floor convent while Sister Mary Blanche does not.

Of the Order members, 223 Sisters work for some type of compensation; 24 are employed at the Hospital. The total percentage of the Order's income provided by Sisters who worked at the Hospital between 1977 and 1981 ranged from 9 to 14 percent. The Order makes no financial donations to the Hospital.

<sup>2</sup> That Sister is not an employee of the hospital in this case.

### The Hospital Corporation

The Hospital Corporation was formed as a membership corporation under the laws of New York in February 1957. By deed and bill of sale dated March 23, 1957, the Order transferred all real and personal property of the Hospital held by the Order to the membership corporation subject to the assumption by that corporation of the existing \$818,500 mortgage debt. The first meeting of the incorporators was held on April 17, 1957, at which the first officers and directors were elected. There is nothing in the incorporating documents which provides for the disposition of corporate assets in the event of a termination of hospital business.

The hospital bylaws provide that the membership of the Corporation shall consist of specific Sisters, those who are members of the Hospital's board of directors and those who are members of the Council of the Order. The bylaws provide that the governance of the Hospital is divided between the members of the Corporation and the board of directors.

The members of the Corporation meet only on an annual basis. They are as follows: Members of the Order who also are members of the board of directors of the Hospital and members of the General Council of the Order. The president and vice president of the Corporation are the superior general and the vicar general of the Order. The vicar general is one of the four members of the Council who has been elected to assist the superior general. The secretary is appointed by the president of the Corporation who is also the superior general of the Order.

The members of the Corporation are required by the bylaws to exercise the following powers with respect to the operation of the Hospital: (1) authorize the borrowing of money or creation of any indebtedness on the part of the Hospital, except that which may be incidental to its day-to-day operations; (2) authorize any transaction affecting the title of real property owned by or purchased or leased by the Hospital; (3) authorize major capital expenditures; (4) authorize any discontinuance of existing services, merger, or consolidation of the Hospital; and (5) authorize any activity by or on behalf of the Hospital which is not permitted to be taken or carried on by certain sections of the Internal Revenue Code.

The bylaws of the Corporation also set forth the composition of the Hospital's board of directors. The bylaws provide that a majority of the board of directors are members of the Order.<sup>3</sup> The bylaws specify that the following members of the Order must also be members of the board of directors: superior general, two councilors, a Sister administrator from each of the other two hospitals operated by the Order,<sup>4</sup> and the hospital coordinator.<sup>5</sup> In addition, the bylaws specify that the officers of the board shall be the following: president—superior general; vice president—hospital coordinator; and treasurer—administrator of the Hospital. The secretary is ap-

<sup>3</sup> During 1979, 17 individuals served on the board; 9 of them, a majority, as required by the bylaws, were members of the Order.

<sup>4</sup> Kenmore Mercy and St. Jerome.

<sup>5</sup> The hospital coordinator must be a member of the Order pursuant to art. 6, sec. 3(B), of the bylaws.

pointed by the president. All officers have been members of the board, three of whom hold their positions by virtue of their membership in the Order.

At the time of the hearing the membership of the board consisted of nine members who are Sisters and eight lay members. Lay members<sup>6</sup> are nominated by a committee appointed by the president and said lay members are elected by a majority of the board;<sup>7</sup> lay directors serve for a period of 2 years and may not serve for more than 3 successive terms.

The religious directors serve by virtue of their Order's appointment and lay administrators by virtue of their position with the Hospital. The nominating committee considers only the selection of lay directors; a review of the minutes of the nominating committee of 1974 through 1979 reveals that the committee did not discuss religious directors during that time, although at least two Sisters were appointed to the board in that period (Sisters Ann Marie Fitzsimmons and Mary Liguori Butler, both members of the General Council, were recommended to the board directly by the president). Although Sister Sheila testified that the religious directors were referred through the nominating committee to the board, the minutes do not reflect that and Sister Sheila admitted that her nomination to the board did not proceed through the committee. Sister Sheila stated that the nominating committee did not interview the Sisters as they did the lay members and that the recommendations for religious director came from the superior general. The prospective lay board members meet with the nominating committee and are provided with materials relating to the operation of the Hospital, including the bylaws, a list of the duties and responsibilities of board members, the philosophy of the Hospital, and the religious directives of the Catholic Hospital Association.<sup>8</sup> Prospective lay board members are asked whether they can act in concert with those tenets without violating their personal beliefs. Courtland LaVallee, one of the lay members of the board, testified that he was asked in an interview prior to his election to the board whether he could live with the Hospital's philosophy (including that on contraception and abortion) and not act against it if an issue involving that philosophy were raised before the board. He testified that it was his understanding that he is expected not to act against the Hospital's philosophy. The record establishes that the board assures itself of the lay member's willingness to conform to the Hospital's philosophy and ethics prior to voting on his nomination to the board.<sup>9</sup> Furthermore, the record reveals that in 1971 board members (the board, then comprised entirely of Sisters, had determined to accept lay members) noted that the board had every intention of maintaining control over those who had

served on the board, as follows: "The Board of Directors feel [sic] that it wishes to retain its prerogative of appointing all of its members, at least for the present. Other lay members are to be added to the Board."

Unlike the lay members, the Sisters are recommended to the board by the president. Sister Annunciata testified that the selection of religious board members rests with herself and the General Council. In that connection Sisters recommended to the board by Sister Annunciata have always been elected. The record does not indicate that any Sister nominee has ever been rejected. The minutes of the general council meetings reflect the Order's concern with the Sister membership on the board and its concern that its majority be maintained.

The record also establishes that the governing body of the Order (the superior general and her four-member Council) decide certain hospital matters at their meetings. Not all of the matters taken up at these meetings are contained in the minutes of the meetings as testified to by the superior general, Sister Annunciata. An example of a decision taken by the superior general and her Council is a decision to appoint Sister Vincentia (hospital coordinator) to work with the hospital administration to develop a job description for a public relations job at the Hospital. Another example of a decision made by the superior general and the Council as reflected in the minutes of August 4, 1974, is that Sister Richard, then superior general, became involved in the administration of the Hospital by discussing the assignment of a Sister in a supervisory position at the Hospital. Superior General Richard also became involved in the appointment of a Sister to a supervisor on a number of occasions.

The superior general and her Council determine who the administrator of the Hospital will be. According to Sister Annunciata it is important to keep the chief administrator position of the Hospital in the hands of the Sisters (in order to further the goals and aims of the Order). Sister Annunciata testified that lay assistants and associate administrators know that the chief administrator's position will go to a qualified Sister. Sister Joel and Sister Marie Andre are being groomed by the Order to become qualified administrators. Sister Joel was approached by the Council to take over the position of administrator at Kenmore Mercy Hospital. At the time Sister Joel was the assistant administrator (third-level administrator) at the Hospital when she was chosen to take over as the chief administrator at Kenmore Mercy Hospital. The second in command at that Hospital, the lay associate administrator, was passed over. And even though the Hospital's current associate and assistance administrators are lay persons, Sister Marie Andre is being groomed by the Order to become chief administrator. The Order recommended the appointment of Sister Joel to the board of Kenmore Mercy Hospital. Sister Annunciata testified that she assumed that Sister Joel had obtained her position as administrator at Kenmore Mercy Hospital by recommendation of the Council to the board.

Section 12, article 6, of the bylaws of the Hospital Corporation requires the authorization of the members of the Corporation before the board can act on the items therein enumerated. That limitation of the powers of the

<sup>6</sup> Lay members have only served on the board since 1971.

<sup>7</sup> The nominating committee, at least between 1974 through 1979, always included a Sister as one of its members.

<sup>8</sup> The Catholic Church is concerned with a number of areas of medical practice including contraception, sterilization, abortion, and brain death. The Catholic Hospital Association has published directives with respect to those areas.

<sup>9</sup> With respect to the election of lay board member Masters, the minutes for April 20, 1979, p. 2, state, in part, "Mr. Masters . . . has expressed his intention to regulate his activities as a board member by the religious and ethical directives binding upon Catholic hospitals."

board expressly applies to (a) any borrowing of money, except that which is incidental to the day-to-day operations; (b) a disposition, mortgage, or lease of real property; (c) a major capital expenditure; (d) a discontinuance of services, merger, or consolidation of the Hospital; and (e) certain prohibited activities under the Internal Revenue Code and Regulations. As previously noted, the membership of the Corporation is exclusively comprised of members of the Order. No lay persons are members of the Hospital Corporation.

The superior general and her Council discuss the requests of the Hospital to borrow money and vote to authorize such requests to be made to the Vatican through the bishop. The minutes of the council meetings reflect that the group satisfied itself as to the Hospital's financial position before voting to authorize the request to be presented to the Vatican.

In addition to the superior general and two members of the Council, the treasurer of the Order, Sister Edward, was a member of the board of directors of the Hospital for the period 1970 through 1978. Sister Edward also handled the financial affairs of the Hospital. The Order directly appoints the hospital coordinator, a salaried position of the Hospital. Sister Vincentia, the coordinator, meets with the Order's General Council to discuss hospital assignments, including the assignment of the administrator, and works both alone and with the administrators to coordinate certain programs at all three of the Order's hospitals and to implement the Catholic health philosophy at the hospitals. Only two members of the Corporation (the remaining two councilors) are not also members of the board of directors of the Hospital.

As previously indicated the Corporation members meet once a year and since 1976 have engaged in the following activities at these annual meetings: (1) reviewed the architectural plans for construction at the Hospital and authorized the administration to explore avenues of funding said construction project; (2) voted to authorize the funding of a possible construction project; (3) voted to authorize the purchase of real estate; (4) approved the administration's research into the building of a parking ramp; (5) voted to limit the board of directors' decision-making powers up to \$1 million; (6) established a committee comprised of the administrator from each of the Order's hospitals and hospital coordinator; (7) reviewed hospital personnel policies as they related to the Sisters (no such committee was set up for lay employees); (8) recommended that the hospital coordinator chair a meeting of administrators and Sister board members in the Order's three hospitals to "work on" timecards for the Sisters; (9) encouraged the administrators to support the actions of a committee which is working on ways to implement the Sisters of Mercy's "philosophy of health care facilities."

The board of directors meets 11 times a year. Half of each meeting, which lasts for about 3 hours, is devoted to reports from hospital administrators. Sister Sheila, the administrator, prepares the agenda for board meetings. Two board members, Sister Annunciata and Courtland LaVallee, testified that ordinarily and, more often than not, board votes are unanimous. The board minutes for 1978 reveal that, of approximately 25 votes taken, only

one member registered opposition in each of 2 votes, and in 1979, of approximately 30 votes taken, only one member registered opposition in each of 2 separate votes. The day-to-day operations of the Hospital rests with the administrator. Sister Annunciata, president of the board of directors, testified that the board has delegated day-to-day operations to the administrator. The job description of the administrator and the minutes of the board meetings establish that it is the hospital administration which advised the board as to the Hospital's operations and activities. The hospital administrator hires her assistant and associate administrators.

Most of the Sisters of the Order employed by the Hospital serve in supervisory or managerial capacities. The three hospitals operated by the Order have directorates which overlap. The superior general is the president of both the membership corporation and board of directors of all three hospitals. All of the hospitals have essentially the same bylaws and on at least one occasion only one annual meeting was held for the membership corporations of all three hospitals. The Order appoints a hospital coordinator (who serves as the vice president of the board of all and appoints the Sisters from one hospital to serve on the board of the three hospitals in order to coordinate the activities among the hospitals). The Sisters employed at the Order's hospitals attend the Order's meetings concerning their health apostolates,<sup>10</sup> although the record does not reflect that lay employees below the supervisory level at these hospitals attend similar meetings.

The record also reveals that about half of the Sisters employed at Mercy Hospital have also been employed at one of the other two hospitals operated by the Order. Relatively few Sisters (about 30 out of 223) work for employers who have no connection with the Order. Most of the Order of Sisters who work at Mercy Hospital of Buffalo live on the premises in the eighth floor convent and eat in the Sisters' dining room and use the adjoining lounge which is reserved for Sisters and their guests. Sister Annunciata said that she knew of no Sister who, having sought a job at the Hospital, was not ultimately hired in some capacity. Sister Sheila testified that it was to the Hospital's advantage to hire a Sister rather than a lay person for the following reasons: The income from the position would go to the religious community; the presence of a Sister in the Hospital promotes the religious philosophy and values; the Sisters set an example for the other employees; and the Hospital benefits from the dedication the Sisters bring to their jobs. Once a Sister's on a job, the Hospital expects a higher degree of behavior from her than it does from lay employees, as she is publicly identified with the Hospital.

Sister Annunciata testified that the Sisters serve on the board of directors at the Hospital more to bring the philosophy of the Order to bear on the Hospital's operation. The goals and aims of the Order are to keep the institution Catholic and ensure its moral and ethical beliefs with respect to the provision of health care. At the behest of the president of the board the job description

<sup>10</sup> "Apostolate" refers to the job or mission to which the Sister is to devote her time and energy.

of the chief of the medical staff of the Hospital was amended to include a provision that the chief be committed to the philosophy of the Hospital.

#### Conclusion With Respect to the Control Issue

The Court of Appeals for the Second Circuit stated, "[R]eliance on any single factor to the exclusion of others to show control is unacceptable," and directed:

On remand, the Board should reexamine its findings that the Order controls the Hospital by considering further the nature of the powers and responsibilities of the board of trustees and the scope of authority wielded by Sister Sheila Marie and her assistants. For example, it would be relevant whether the trustees meet to consider business affairs of the Hospital; how often they meet; whether the members of the Order on the board of trustees have consistently voted as a majority block to promote the Order's interests, especially when important policymaking and administrative decisions were being made; and whether they received instructions from the Order on how to vote. Any other evidence of significant financial control would also be quite important, of course. [668 F.2d at 665.]

The Hospital Corporation was created by the Order and the land and buildings of Mercy Hospital were given to the Corporation, subject to the mortgage, by the Order. The constitution and bylaws of the Corporation ensure that the control thereof is and will be by the Order. The superior general of the Order is the president of the board of directors of the Hospital Corporation. The vicar general of the Order is the vice president of the Hospital Corporation, and the administrator of the Hospital is a member of the board and a Sister of the Order. The constitution of the Hospital Corporation ensures that the majority of the board, including the president and vice president, will remain members of the Order. Although the lay people on the board are not required to be Catholics and two are not, in fact, Catholics, they are required to adhere to the philosophy of the Order which is the philosophy of the Hospital Corporation. The membership of the Hospital Corporation consists exclusively of members of the Order. All important matters must be approved by the membership of the Hospital Corporation which includes no lay persons.

The General Counsel has proved by a preponderance of the evidence that the Order of Sisters of Mercy controls Mercy Hospital of Buffalo and I shall so recommend.

#### The Facts Concerning the Question of Community of Interest

Sister Blanche has worked as a regular part-time billing clerk in the business office of the Hospital since September 1975. Her terms and conditions of employment and benefits will be compared with those of the other business office clerical employees.

Sister Mary Blanche joined the Order in 1934 and became a teacher. After 41 years of teaching, she decided to leave the teaching profession. She started working

in the business office of Mercy Hospital of Buffalo by expressing a desire to do so to her superiors in the Order. She was given responsibility for Medicaid inpatient billing.

The unit employees in the business office punch a timeclock. The only two exceptions are Sister Blanche and employee Mary Moesch. Moesch has a physical impairment authenticated by a doctor's excuse thus permitting her to write in her timecard rather than punch the timeclock.<sup>11</sup> Sister Blanche fills in her own timecard, as do the supervisors and managers, but she did not begin filling out a timecard until late 1978.<sup>12</sup> Before that, her time was not recorded.

#### Health Insurance

Full-time lay employees are entitled to Blue Cross-Blue Shield health insurance. The Hospital pays 80 percent of the premium and the employee pays 20 percent. Regular part-time and part-time lay employees are not entitled to any employer paid premiums, although they may obtain coverage under the Hospital's group policy if they pay the full premium. Unlike the lay employees, all Sisters belonging to the Order are provided with health insurance through the Hospital's group policy at the Hospital's expense. The Sisters pay no part of the premiums.

Sisters who leave the employment of the Hospital may continue to remain a part of the Hospital's group policy if the Order pays the premiums. Thomas Webber, assistant administrator for finance at the Hospital, testified that he knew of no instance when a Sister had been refused coverage. However, some lay employees have been refused permission to retain their group coverage upon leaving the Hospital.

#### Wages and Other Benefits

The business office unit employees are hourly rated and paid biweekly. Sister Blanche is salaried and receives no paycheck.<sup>13</sup> Accordingly to the Order's constitution, Sister Blanche's salary belongs to the Order and not to Sister Blanche. She is required to share her earnings and the superior general is authorized to administer these funds. Sister Blanche's salary is included with the salaries of the other Sisters and is supposed to be sent to the Order once a month. However, the Hospital does not always send the money to the Order on time. The payments have been several months late on occasion.

Paid vacation time for full-time lay employees depends upon time of service, with 10 days for those employees who have been employed for less than 5 years; 15 days for 5 to 10 years; and 20 days for those with 10 years or more.<sup>14</sup> The record contains no evidence for any lay

<sup>11</sup> The timeclock is located on another floor in an isolated area of the hospital.

<sup>12</sup> The contract between the Hospital and the Order, dated September 1, 1978, provides that timecards of the Sisters' services will be maintained as for other employees holding similar positions.

<sup>13</sup> Sister Annunciata testified that she did not know of any Sisters employed by the Hospital who have ever received a paycheck directly.

<sup>14</sup> This schedule was in effect at the time of the election but changed in 1981 to provide 25 days' paid vacation for those employees with 20 or

*Continued*

employees being paid for time not worked (other than vacation, holidays, sick, or personal leave). Sister Blanche testified that she thought she was entitled to paid holidays and she took off her birthday as a holiday while other employees worked on holidays during their probationary period even though the office was closed for most of the employees (certain parts of the business office are open at all times).

The employees handbook provides that only full-time employees are entitled to paid sick days and paid personal leave days and regular part-time and part-time employees are not entitled to personal leave days or paid sick time.

Sisters, however, regardless of years of employment, are paid while out of work because of illness and sometimes for months at a time. The record shows the Sisters are not removed from the payroll when they become ill unless it appears that they will be out for extended periods. The record shows that Sister Blanche was paid although she was out sick for 5 days. Sister Lois was paid her regular salary although her timecard showed that she worked only 17 hours between early March and mid-September 1981 when she was terminated. Sister John Aloisius received a regular pay between April and September 1981 (when she was terminated) although she only worked 1 week during that time.

Three lay employees were provided with extended sick benefits by the Hospital. Two returned to work and one needed the extended benefits to qualify for retirement. Two of the employees received sick pay at a reduced rate. One was a supervisor and the other two were professionals. Thus, it appears that different standards were used to determine whether a Sister is entitled to similar benefits. The personnel director testified that one of the factors they have in determining whether an employee is entitled to additional sick pay is the employee's length of service. Sister Lois and Sister John had only been employed at the Hospital for 3 years prior to the extension of benefits to them. Of the three lay employees who received extended benefits, two were employed 15 to 18 years and a third was a supervisor who returned to work.

Lay employees must punch out, including lunch, if they leave the hospital premises. As previously indicated, Sister Blanche does not punch the timeclock and was paid when she left the Hospital for funerals or outside medical care. Lay employees must use their personal days for doctor's appointments or they will not be paid.

more years of employment. Full-time employees are entitled to 10 paid holidays. Regular part-time employees receive 10 days off each year, which includes vacation and holidays or any combination thereof, inasmuch as there is no separate vacation and holiday pay for regular part-time employees. At the time of the election, Sisters were entitled to a flat 3 weeks off with pay, regardless of length of service, that was increased to 4 weeks in 1981. In addition to receiving an extra week of vacation in 1981, the Sisters were granted a raise in February shortly after lay employees were granted a raise. Sister Blanche, who was employed on a part-time basis, received paid holidays as well. Respondent contends that Sister Blanche was paid for holidays not worked for 7 years by mistake. However, inasmuch as Sister Blanche's timecard was checked by her supervisor every pay period, and she marked on it that she was allotting the unworked hours to holidays, it is difficult to accept that explanation especially because the same "mistake" was made with other part-time Sisters (Sister Maureen and Sister Marie Ellen) who were paid for holidays not worked.

No business office unit employees are paid for time they do not work.

From July 5 to Labor Day, Sister Blanche arrived for work 5 to 10 minutes late three or four times a week because mass was celebrated late during the summer at the convent where she lives and her attendance at mass made her late for work. However, her timecards do not reflect the fact that she is late even though her supervisors are aware and she is paid for the entire workday. In contrast, lay employees who are late for work receive three warnings and then docked if they are late. Lay employee Mary Ann Byrne testified that she was docked in 1978 and 1979 for being "quite late a few times, about 2 or 3 minutes each day" because she was getting married and because she had car trouble. She said she was docked 7 minutes for being 1 minute late on one occasion. Supervisor Jakubik testified that lay employees would be given permission to attend mass every morning on worktime.

The timecards of a number of Sisters reveal that they generally receive the same monthly salary regardless of what is written on the timecards. For example, Sister John Aloisius worked a varying number of hours each pay period in 1980 and 1981 ranging from 27 to 55 and was off sick for 22 weeks. Her pay did not fluctuate except when she received a general raise. Sister Maureen received the same salary every month although her timecard notes 4 weeks of "unpaid" vacation, 9 days of illness, and only 20 hours of work in one pay period instead of her usual 40 in June 1980.

Sister Blanche was allowed 32 paid days off in 1979. Her salary, when broken down into an hourly rate or dividing it by the number of hours/week of work, 32.5 hours and 52 weeks in a year, amounts to \$4.75 an hour. That compares to \$4.45 an hour for lay billing clerks in the business office.

At the time of the election, in addition to receiving one of the highest wages in the business office, Sister Blanche received 22 more paid days off than other regular part-time employees. The hospital administrator, Sister Sheila, admitted that Sister Blanche's salary did not take into account the fact that she received more than three times paid time off than regular part-time lay employees.

#### Payroll Processing and Maintenance of Records

The Sisters' payroll is processed separately from that of the lay employees. Sisters' salaries are sent in lump sum to the Order on a monthly basis. Raises are given to lay employees at different times from those given to Sisters.

Pursuant to their written authorization, lay employees' taxes, health insurance, and other items are deducted from their wages. Written deduction authorizations are not submitted by the Sisters nor are taxes deducted from their salaries. Notwithstanding the absence of written authorizations, maintenance fees are deducted from the salaries of the Sisters.<sup>15</sup> In addition, the salaries of the Sis-

<sup>15</sup> The sum of \$350 per month for room and board is deducted for the Sisters who live in the eighth floor convent and \$50 for those who live elsewhere and eat only one meal a day at the Hospital.

ters are diverted to the payment of bills and purchase of real estate by the Order at the behest of the hospital administrator without authorization from the Sisters employed at the Hospital. The Hospital does not pay the bills of lay employees. Sister Blanche's records are kept separate from the other business office clerical employees whose records are maintained on the Hospital's computer.

As for other records, the official personnel files of the Sisters (applications, evaluations, and other official records) are kept in the hospital administrator's office together with the personnel files of the supervisors and managers. Personnel files of lay employees are located in the personnel department. After a certain number of years the personnel files of lay employees are recorded on microfilm. The personnel files of the Sisters are destroyed by the administrator when an employee Sister dies or permanently leaves the Hospital.

#### Probationary Period

Sister Blanche did not serve a 6-month probationary period upon being employed, as is required of lay employees in the business office. Sister Blanche testified that she was not sure if she was on probation after she was hired. She said she received no raise after 6 months of employment. She did not work on any of the holidays during her first 6 months but was paid for them. She was not evaluated after 6 months. In fact, prior to the December 1979 election, she was never evaluated. Sister Blanche received her first raise 7 months after she was hired, at a time when all Sisters received a general increase in salary (July 1976).

The employees' handbook provides that an employee must complete a probationary period of 6 months. Unit employees hired both before and after Sister Blanche testified that they had served a probationary period; were required to work holidays in order to be paid for them; were evaluated after 6 months; and, if evaluated favorably, received a raise and entitlement to benefits such as paid holidays and health insurance.

#### Living and Dining Facilities

As previously stated, most of the Sisters who work at the Hospital live on the hospital premises in the eighth floor convent. All Sister employees eat in the Sisters' dining room. The lay employees eat in the hospital cafeteria which is also open to hospital visitors. The Sisters' dining room has round tables which are smaller than those in the cafeteria and padded chairs. On occasion, the menu in the Sisters' dining room is different from that in the cafeteria. At the time of the election, Sister Blanche ate lunch at the Hospital's expense. Lay employees did not.<sup>16</sup>

#### Free Health Care

Sister employees of the Hospital belong to the Order, and their parents are entitled to free health care from the Hospital. The Hospital does not charge them for any bill

balance should their health insurance not cover the entire bill. Full-time unit employees are entitled to only a 25-percent discount on the unpaid balance and the regular part-time employees receive a 10-percent discount; parents of lay employees are not entitled to any discount.<sup>17</sup>

#### Attendance of Hospital Ceremonies

Sister Blanche and other Sisters have been invited to and have attended several dedication ceremonies in the hospital lobby during working hours. Lay employees of the business office are not invited to attend these ceremonies. To the contrary, several were reprimanded when they left their work stations to view the ceremonies from the cashier's office. Jakubik testified he was concerned that the business of the office was not being attended to while the lay employees were viewing ceremonies. He did not explain his lack of concern, if any, about Sister Blanche's absence from the office during the ceremonies.

#### Hours of Employment

Sister Blanche decided on her own that she would work from 8 a.m. to 3 p.m., the hours she worked while teaching school for many years. She testified that Sister Cor Maris, then the business office manager, expected her to work a full day (until 4 p.m.), but Sister Blanche told her that she was going to work only until 3 p.m., and indeed prevailed. The record shows that a lay employee was discharged because she could not work certain designated hours.

#### Soliciting During Worktime

A hospital rule prohibits selling and/or soliciting in the business office on worktime. Sister Blanche testified that she had never asked nor was expressly given permission by supervision to sell or solicit at work. None the less, on occasion she brought in boxes of items (novelty pencils, pens, and decorations) to sell to coworkers in the business office. On one occasion, Sister Blanche lined up the decorative shovels that she was selling in the supervisor's office so that the employees could select which they wanted to buy. She also handed out fliers announcing a raffle and one such flier was posted in the office not long after management circulated a memo reiterating the prohibition of soliciting in the office. Lay business office employees on occasion sold tickets on hand made items. Other employees would bring in such an item to show and later make one upon request. The record shows that no lay employee had engaged in such conduct to the extent that Sister Blanche has. Moreover, other employees have been reprimanded for selling in the office while Sister Blanche, who has been more open about her soliciting activities, has not been so reprimanded.

<sup>16</sup> After the election, in October 1981, Sister Blanche began to be charged a \$50 maintenance fee. She testified, however, that she had been eating lunch in the Sisters' dining room since the time she was hired.

<sup>17</sup> If they cannot afford to pay, they may, like any other patient, apply for free care pursuant to the Hill-Burton Act. Parents of Sisters of the Order, on the other hand, are not sent bills for services even when they do not qualify for free care under Hill-Burton.

### Other Benefits

Sister Blanche does not receive a pension, social security, or disability or unemployment insurance coverage by virtue of her employment with the Hospital as do lay employees. The Sisters are covered by the Order's retirement plan and social security.

### Conclusions Concerning Community of Interest

The difference in wages, hours, and other terms and conditions of employment between Sister Blanche and lay employees in the business office, as stated above, are numerous and need not be reiterated. The disparity proves that Sister Blanche maintains as a member of the Order a close and special relationship with management of the Hospital by virtue of her membership in the Order. The lay employees are a "breed apart."

Sister Blanche testified that she has been a member of the Order for 48 years and her commitment to the Order is such that she expects to remain a member for the rest of her life. She lives in a convent with other members of the Order and wears a habit which identifies her with the Order and the Hospital's management. Her salary belongs to the Order and is administered by the superior general of the Order. In fact, the Order depends upon the salaries of its members (almost 12 percent of the Order's income over the past few years has been derived from the salaries of the Sisters who work in the Hospital) in order to remain financially solvent and decides how the earnings of the Sisters are to be spent without their express authorization.

The National Labor Relations Board has held that Sisters that belong to an Order that operates an institution should be excluded from the bargaining unit because they do not share the same benefits and terms and conditions of employment as the lay employees. *Carroll Manor*

*Nursing Home*, 202 NLRB 67 (1973). Sisters have special interest resulting in a special employment relationship clearly different from that of other employees. See also *Saint Anthony Center*, 220 NLRB 1009 (1975); *Seton Hill College*, 201 NLRB 1026 (1973).

The wages, benefits, and terms and conditions of employment for the Sisters employed by the Hospital, including Sister Blanche, are quite different from those provided by lay employees. Sister Blanche has enjoyed certain privileges not afforded other lay employees of the business office of the Hospital. She and her fellow Sister employees, including the hospital administrator and the president of the Hospital Corporation, by virtue of wearing their habits, are identified in the view of the public and other employees as management of the Hospital even though the work of some is not managerial in nature and, for this reason, are held to different standards from other employees.

Based on the entire record and having thoroughly considered the briefs submitted by Mercy Hospital of Buffalo and the General Counsel, I find that the General Counsel has proven by a preponderance of the evidence that Sister Blanche does not share a sufficient community of interest with the business office clerical employees so as to warrant her inclusion in the unit.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended:

### ORDER

Mercy Hospital of Buffalo is controlled by the Sisters of Mercy of the Buffalo Diocese or the "Order" herein and Sister Mary Blanche does not share a sufficient community of interest with the employees in the bargaining unit so as to warrant her inclusion in the unit.